APPENDIX H

FILED
JUL 11 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

GREGORY DEAN CALIENDO,	)	No.
	)	CV-99-7263-R
Petitioner,	)	(JWJ)
	)	
vs.	)	REPORT AND
	)	RECOMMENDA-
WARDEN OF CALIFORNIA	)	TION OF UNITED
MEN'S COLONY, et al.,	)	STATES
	)	MAGISTRATE
Respondents.	)	JUDGE
	)	

This Report and Recommendation is submitted to the Honorable Manuel L. Real, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons discussed below, it is recommended that the Petition be denied and dismissed with prejudice.

I. SUMMARY OF PROCEEDINGS

On July 15, 1999, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody (28 U.S.C. § 2254). On October 26, 1999, Respondent filed an Answer arguing that the Petition should be dismissed on procedural grounds. On July 20, 2000, the Court found that the Petition was exhausted and not procedurally defaulted and ordered Respondent to answer its merits. Respondent filed a Supplemental Answer to the Petition on August 18, 2000. Petitioner filed a Traverse to the Supplemental Answer on September 7, 2000.

II. BACKGROUND

On August 12, 1996, a Los Angeles County Superior Court jury convicted Petitioner of second degree burglary of a vehicle in violation of California Penal Code § 459. (Clerk's Transcript ("C.T.") 152). The court sentenced Petitioner under California's Three Strikes law to twenty-five years to life in state prison. (C.T. 192-94).

Petitioner appealed his conviction to the California Court of Appeal which affirmed the conviction on March 31, 1998. (Answer, Exh.C). Petitioner filed a Petition for Review in the California Supreme Court which the court denied on July 15, 1998. (Answer, Exh. E).

III. DISCUSSION

A. Standard of Review

Because the Petition was filed after the effective date of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), it must be reviewed under the AEDPA's provisions. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). The relevant portions of the AEDPA provide as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254. Under the AEDPA, a federal court shall presume that a determination of factual issues made by a state

court is correct, and Petitioner has the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The Supreme Court has explained the standard of review under the AEDPA as follows:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The Ninth Circuit has held that "in order for a state court's application of federal law to be unreasonable, it must have been clearly erroneous." Weighall v. Middle, 215 F.3d 1058, 1062 (9th Cir. 2000).

Under the AEDPA, circuit law "may be persuasive authority for purposes of determining whether a particular state court decision is an 'unreasonable application' of Supreme Court law, and also may help [a federal habeas court] determine what law is 'clearly established.'" Van Tran v. Lindsey, 212 F.3d 1143, 1154 (9th Cir. 2000) (quoting Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 2000)). However, "only the Supreme court's holdings are binding on the state courts and only those holdings need be 'reasonably' applied." Id.

In reviewing a habeas petition, the Court will examine an explicated California Court of Appeal opinion under the AEDPA where the California Supreme Court opinion denies the same claims without discussion because "where there has been one reasoned state court judgment rejecting a federal claim, [federal habeas courts should presume that] later unexplained

orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S.Ct. 2590, 2594, 115 L.Ed.2d 706 (1991).

B. Improper Contact between Prosecution Witness and Jury

Petitioner's first claim is that his due process rights were violated when "[d]uring jury deliberations the investigating officer in the case, Officer M[u]ndell, had a twenty minute conversation with three jurors which several other jurors overheard. The conversation included, but was not limited to, the Officer's current workload and the fact that the Officer was doing a good job." (Petition, 6). The Court of Appeal denied Petitioner's claim as follows:

> Just after the jury began deliberating, defense counsel noticed several jurors talking to Detective Mundell in the hallway "for approximately 15 minutes." Outside of the presence of the jury, Mundell admitted that he had conversed with one to three jurors after one of the jurors stated, "You're awfully busy in here." Mundell told the court that he and the jurors had not discussed anything pertaining to the case, the defendant, the attorneys, or the court, and that they had instead discussed how busy he was, "Cooperstown, baseball, small towns, . . . a lot of small talk but nothing to do with this case. . . ."
>
> When the court asked of the jury which jurors had talked to Mundell, three jurors admitted doing so. Each of the jurors denied talking about the trial, the facts of the case, the witnesses, the evidence, the defendant, the attorneys, the judge, or "anything whatsoever that anybody could say is any discussion about the case or any of the parties connected with the case." Juror 4 told the court that he and Mundell had talked about baseball, the cost of eating at the courthouse, the juror's neighbor, and "that he's doing such a good job as an officer; in other words, I wouldn't want to be in his possession [soc] to be a cop or officer." Juror 5 told the court that he had talked to Mundell about the amount of paperwork Mundell had to do and Mundell's exercise regimen. Juror 22 (sitting as

juror number 9) said that she had only asked Mundell how long he thought it would be before the jury was let back into the courtroom.

The court asked if any other jurors had overheard the conversation between Mundell and any of their fellow jurors, and several indicated that they had. The court asked each juror individually whether he or she had heard anything other than what the other jurors reported. Each juror said that they had not, except for jurors 8 and 11, who said that heard something about gym equipment. The court then asked each juror individually whether the conversations between Mundell and the jurors would influence his or her judgment in the case. Each juror said that his or her judgment would not be affected. The court repeated its frequent admonishment not to speak to anyone concerning any subject connected with the trial.

An apparently neutral witness to the conversation, Attorney Fefferman, told the court he overheard "a similar conversation" about work and the effect that Mundell's presence in court had on his colleagues' workload.

The court denied [Petitioner's] motion for a mistrial based on jury misconduct, saying that it accepted the juror's and Mundell's representations as to the subject matter and the juror's representations that it would not influence their judgment. [Petitioner] later re-raised the issue in an unsuccessful motion for a new trial.

* * *

In People v. Cobb (1955) 45 Cal.2d 158, the Supreme court held that no presumption of prejudice arose from the mere fact that a juror had a private conversation with a relative of the accused on a topic unrelated to the trial. (Id. at p. 161.) Without mentioning Cobb, the court in People v. Ryner (1985) 164 Cal.App.3d 1075, upon which [Petitioner] relied, held that a presumption of prejudice arose even where the subject of the conversation between a juror and a prosecution witness was unrelated to the pending case. (Id. at p. 1082.) Since Cobb has not been overruled, we are bound to apply it and disregard the

> contradictory holding of Ryner. [Citation.] Accordingly, we do no presume prejudice from the incident.
>
> [Petitioner] has suggested a number of potentially prejudicial effects Mundell's conversation might have had, but the record as a whole discloses no reasonable probability of actual harm to [Petitioner]. Juror 22's question was a trivial inquiry regarding the court's hours. Juror 4 explained the intent of his comment that Mundell was "doing such a good job as an officer" to mean that Juror 4 would not want to have Mundell's job. Thus, rather than expressing admiration for Mundell, the juror was simply saying that police work was necessary, but unenviable. No topic discussed by Mundell and Jurors 4 or 5 had any tendency to reflect upon or bolster Mundell's credibility, and every juror said that he or she would not be influenced by the conversation between Mundell and members of the jury. [Petitioner] argues that, pursuant to Ryner, the jurors' statements must be disregarded. However, the Ryner court's decision to ignore the juror's statement as based on its belief that Evidence Code section 1150 prohibited the consideration of such statements, even though they were made prior to the verdict. . . . [People v.] Cooper[, 53 Cal.3d 771, 838 (1991)] rejected this proposition.

(Answer, Exh. C-94-95, 97-98).

This Court must review both steps of the state court's analysis under the AEDPA. Specifically, the Court must determine first whether it was reasonable to find that prejudice need not be presumed in this case and second whether it was reasonable to find that no actual prejudice occurred. Although this Court agrees with the California Court of Appeal that "the conversation between the jurors and Mundell was improper and fraught with the danger of improper influence and communication of extraneous information," it nevertheless also agrees with the state courts' ultimate findings that Petitioner was required to show actual prejudice from the improper contact and that he has not done so. (See Answer, Exh. C-97-98).

1. Petitioner is Required to Show Prejudice

The state courts reasonably applied Supreme Court precedent in requiring Petitioner to make a showing of actual prejudice. As the Supreme Court has explained: "[t]here may be cases where an intrusion should be presumed prejudicial," but the Court has "generally . . . analyzed outside intrusions upon the jury for prejudicial impact." United States v. Olano, 507 U.S. 725, 738-39, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

Petitioner relies heavily on Turner v. Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965) for the proposition that prejudice should be presumed in this case. In Turner, two deputy sheriffs were in charge of the jury throughout the trial but also testified as key prosecution witnesses. Id., 379 U.S. at 467-68. The Court explained that "it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two key witnesses for the prosecution. We deal here not with a brief encounter, but with a continuous and intimate association throughout a three-day trial. . ." Id., 379 U.S. at 473. Therefore, the Court presumed prejudice and reversed the conviction on due process grounds. Id., 379 U.S. 466.

However, it is a reasonable interpretation of Supreme Court authority to distinguish Petitioner's case from Turner, and therefore require a showing of actual prejudice because in Petitioner's case there was only one isolated incident of improper contact, even though Mundell was a central prosecution witness.[1/] Circuit courts have interpreted Turner

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1. Mundell was a key witness because, under California law, in order for a defendant to be guilty of burglary of a vehicle, the vehicle must be locked when the defendant entered it. Cal. Penal Code § 459 ("Every person who enters any . . . vehicle . . . when the doors are locked . . .with intent to commit grand or petit larceny or any felony is guilty of burglary."); In re Lamont R., 200 Cal.App.3d 244, 247 (1988) ("An essential element of vehicular burglary under [Penal Code section 459] is that the vehicle must be locked."). Petitioner did not testify at trial, and the only testimony directly addressing whether Petitioner entered the car while its doors were

and related Supreme Court authority in a similar manner. See e.g. Lee v. Marshall 42 F.3d 1296, 1298-99 (9th Cir. 1994) (requiring showing of prejudice where contact between official and jury is minimal); Helmick v. Cupp, 437 F.2d 321 (9th Cir.) (per curiam) (distinguishing Turner where bailiff's contact with jurors was short-lived and his testimony was not central to the prosecution); Johnson v. Wainwright, 778 F.2d 623, 627 (11th Cir. 1985) ("When either the individual's official contact with the jury or his participation in the prosecution is so minimal in the juror's eyes as to have a de minimis impact on the jury's deliberations for all apparent purposes, some showing of actual prejudice must be made."); compare Agnew v. Leibach, 250 F.3d 1123, 1132-33, 1135 (7th Cir. 2001) (prejudice presumed where bailiff takes charge of jury for one entire day of trial and then provides key prosecution testimony during second day of trial, however "a defendant [must] prove actual prejudice . . . where the bailiff's contact with the jury is de minimis or the bailiff's testimony involves some merely formal aspect of the case.").

Because Mundell's contact with the jurors was minimal (he did not supervise them during the trial or speak with them on a number of occasions), this case can be reasonably distinguished from Turner. Accord Lee, 42 F.3d 1296; Johnson, 778 F.2d 623.

2. No Showing of Actual Prejudice Made

The next question is whether the state courts reasonably determined that no showing of prejudice was made. As the Supreme Court has explained, the "ultimate inquiry [in determining whether prejudice has occurred is:] Did the intrusion affect the jury's deliberations and therefore its verdict?" Olano, 507 U.S. at 739.

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locked came from Detective Mundell who testified that Petitioner made a statement to him at the police station that "the doors were locked on the Suburban, and he picked up a large rock and smashed it against the passenger's wing window three times, and on the third time the window broke. He reached in, unlocked the door, and then he climbed in the Suburban." (Reporter's Transcript ("R.T.") 171).

The state courts made a finding that Petitioner was not prejudiced by the contact because the jurors all stated that they would not be affected by the discussion which did not involve the case in particular. (R.T. 352-57, 359, 361-62; Answer, Exh. C-93, 97-98). The three jurors who spoke with Mundell reported their conversations as follows:

Juror 5: "We talked about the amount of paperwork on Detective Mundell's desk top and his exercise regime and the fact that the he doesn't have a television in this house where he works out."

Juror 4: "We talked about eating, and he has to pay so much money to eat here all the time, and that he's doing a good job as an officer; in other words, I wouldn't want to be in his possession [sic] to be a cop or officer. I was talking about baseball. I was talking about my neighbors. That's it. Just surface talk."

Juror 9: "I asked him how long he thought it would be before we would get back into court to start deliberating."

(R.T. 352-53). A witness described what he heard of the conversation as follows: "Basically I heard a similar conversation concerning work and there was some colloquy back and forth between one of the jurors and the officer concerning when he's here his other peers have work to do and each of their workload is affected by people being in court and this, that and the other." (R.T. 359).

Given the fact that the jurors professed their ability to judge the case in a fair manner just as they would have before the conversation and that the conversations did not involve anything about the case specifically, this Court cannot say that it is unreasonable to find that Petitioner was not prejudiced by this conduct.

Notwithstanding the foregoing, this Court recognized the potential for prejudice in the facts of the instant case. Specifically, as the Court noted above, Detective Mundell's

testimony was crucial in determining whether the car was locked when Petitioner entered it (Mundell did not record Petitioner's statement or have Petitioner acknowledge it in writing) and therefore his credibility was an important issue at trial. (See R.T. 169, 202, 273). This is especially true here where some evidence suggested that the car may have already been broken into before Petitioner entered it, that is, none of the missing property was found at the scene or in Petitioner's possession when he was taken into custody directly from the vehicle.[2/] (R.T. 66, 69, 72, 93, 114-18, 130, 145-46). In addition, the jury appeared to question whether the car was locked because it requested read-back of Mundell's testimony as well as that of the arresting officers regarding which doors were locked when they found the car. (R.T. 363-64, 370). Finally, as to the importance of Mundell's testimony, the Court notes that Petitioner was convicted in a re-trial after the jury in his first trial deadlocked (with seven jurors favoring a not guilty verdict) apparently over its determination whether the doors were locked when Petitioner entered the car. (R.T. 14, 19).

However, as explained above, recognition of both the impropriety of Detective Mundell's conversation with deliberating jurors and the theoretical possibility that it could have swayed a jury unfairly is not a basis under the AEDPA for this court to recommend granting the instant petition. There is sufficient support in the record and in the relevant case law for the state courts' finding that Petitioner was not prejudiced by the improper contact between Mundell and the jurors. Therefore, the California courts' denial of this claim was not contrary to, and did not involve an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States and was not based on an unreasonable determination of the facts in light of the evidence before it. 28 U.S.C. § 2254(d).

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2. Petitioner's conviction was the result of a re-trial after his first jury deadlocked. The jury in Petitioner's original trial sent out a note during deliberations asking what items were reported missing from the car and the jury in Petitioner's re-trial sent out a note asking what items were recorded in Petitioner's possession when he was arrested. (R.T. 13, 363).

C. Denial of Confrontation Rights

Petitioner's second claim is that the trial court denied his confrontation rights when it excluded evidence of his statement to police officers as he exited the vehicle that he was only in the car to lie down and get some sleep. (Petition, 6). The trial court excluded the evidence as inadmissible hearsay. (R.T. 107, 148). The written opinion of the Court of Appeal addressed only the state law aspects of this claim and found that the statement did not fall into any state-law hearsay exception. (Answer, Exh. C-99-100).

The Confrontation Clause does not require the admission of a defendant's exculpatory out-of-court statement, rather it protects a defendant's right to cross-examine witnesses in court (i.e., to limit the introduction of out-of-court statements). Ohio v. Roberts, 448 U.S. 56, 62-63, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) (Confrontation Clause protects right to confront witnesses in court, often by ensuring the exclusion of out-of-court statements); United States v. Lopez-Alvarez, 970 F.2d 583, 587-88 (9th Cir.) (where excluded hearsay evidence is helpful to defense, due process, not confrontation, rights are potentially violated), cert. denied, 506 U.S. 989, 113 S.Ct. 504, 121 L.Ed.2d 440 (1992). However, even to the extent that Petitioner is raising a due process claim, he is not entitled to habeas relief on this ground.

"The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Taylor v. Illinois, 484 U.S. 400, 410, 108 S.Ct. 646, 653, 98 L.Ed.2d 798 (1988). As the Supreme Court recently explained:

> A defendant's interest in presenting [relevant] evidence may thus bow to accommodate other legitimate interests in the criminal trial process. As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to

> serve. Moreover, we have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused.

United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 1264, 140 L.Ed.2d 413 (1998) (internal citations omitted).

> [T]he Constitution leaves to the judges who must make these [evidentiary] decisions wide latitude to exclude evidence that is repetitive . . . only marginally relevant or poses an undue risk of "harassment, prejudice or confusion of the issues." [citation omitted]. Moreover, we have never questioned the power of the States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability — even if the defendant would prefer to see that evidence admitted.

Crane v. Kentucky, 476 U.S. 683, 689-90, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986) (internal citations omitted). "[A]ny number of familiar and unquestionably constitutional evidentiary rules [such as hearsay rules] authorize the exclusion of relevant evidence." Montana v. Egelhoff, 518 U.S. 37, 42, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (plurality opinion).

There is no requirement "that a defendant must be allowed to put on any evidence he chooses." LeGrand v. Stewart, 133 F.3d 1253, 1266 (9th Cir.) (citation omitted), cert. denied, 525 U.S. 971, 119 S.Ct. 422, 142 L.Ed.2d 551 (1998). "Evidence of little importance, whether merely cumulative or of little probative value, will almost never outweigh the state interest in efficient judicial process." Perry v. Rushen, 713 F.2d 1447, 1453 (9th Cir. 1983), cert. denied, 469 U.S. 838, 105 S.Ct. 137, 83 L.Ed.2d 77 (1984). In a limited context, however, the Supreme Court has found that the exclusion of evidence violates due process where the excluded evidence is highly reliable and relevant to the defense. Green v. Georgia, 442 U.S. 95, 97, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979); Chambers v. Mississippi, 410 U.S. 284, 300-302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); Lopez-Alvarez, 970 F.2d at 588.

Here, the excluded evidence was neither highly reliable or highly relevant. Petitioner's statement to the arresting officers that he was in the car to sleep was a self-serving exculpatory statement which would have been cumulative to evidence of his later, identical statement that he was in the car to sleep, which was presented to the jury through Mundell's testimony and was noted in defense counsel's opening argument and the prosecutor's closing argument. (R.T. 45-46, 172, 268). Therefore, Petitioner's due process rights were not violated by the exclusion of his statement under California's hearsay rules. Taylor, 484 U.S. 400; compare Chambers, 410 U.S. at 302-03 (under the facts of this case, exclusion-of highly reliable and critical defense hearsay evidence violated due process). The California courts' denial of this claim was not contrary to, and did not involve an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States and was not based on an unreasonable determination of the facts in light of the evidence before it. 28 U.S.C. § 2254(d).

D. Reasonable Doubt Jury Instruction

Petitioner's third claim is that the trial court violated his due process rights when it instructed the jury with CALJIC 2.90. (Petition, 6-7). The California Court of Appeal denied this claim as follows:

> [Petitioner] contends the reasonable doubt instruction, CALJIC 2.90,[3] violated due process because it failed to define "an abiding conviction." We have repeatedly rejected such contentions (see, e.g., People v. Godwin (1996) 50 Cal.App.4th 1562, 1571-1572; People v. Torres (1996) 43 Cal.App.4th 1073, 1077-1078; see also People

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3. In relevant part, CALJIC 2.90 provides as follows: "Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." [See C.T. 128].

> v. Tran (1996) 47 Cal.App.4th 253, 262-263.) For the reasons stated in these cases, [Petitioner's] claim has no merit.

(Answer, Exh. C-100) (footnote in original).

As the Supreme Court has held,

> The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. . . . Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt, . . . the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. . . . Rather, taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury.

Victor v. Nebraska , 511 U.S. 1, 5, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (citations and internal quotation marks omitted). In reviewing the constitutionality of a challenged jury instruction, "the proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it." Id., 511 U.S. at 6 (citing Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)).

In Victor, the Supreme Court reviewed an earlier version of CALJIC 2.90 which provided:

> "Reasonable doubt" is defined as follows: It is not a mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel and abiding conviction, to a moral certainty, of the truth of the charge.

CALJIC No. 2.90 (1988). In rejecting a due process challenge to the earlier version of CALJIC 2.90, the Court held that "[a]n instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden of proof." Victor, 511 U.S. at 14-15 (emphasis added). In other words, CALJIC 2.90, stripped of references to "moral certainty" of guilt, "correctly states the government's burden of proof." This describes precisely the instruction given in Petitioner's case; therefore his due process rights were not violated.

The Ninth Circuit has reached the same conclusion in interpreting Supreme Court law. See Lisenbee v. Henry, 166 F.3d 997, 999-1000 (9th Cir.) (jury instructions cast in terms of "abiding conviction" without reference to "moral certainty" satisfy due process requirement), cert. denied, 528 U.S. 829, 120 S.Ct. 82, 145 L.Ed.2d 70 (1999). The California courts' denial of this claim was not contrary to, and did not involve an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States and was not based on an unreasonable determination of the facts in light of the evidence before it. 28 U.S.C. § 2254(d).

E. Equal Protection Violation

Petitioner's fourth claim is that California's Three Strikes law violates equal protection. (Petition, 7). The California Court of Appeal denied this claim as follows:

> With respect to his equal protection claim, [Petitioner] has failed to show the threshold prerequisite: unequal treatment of persons who are similarly situated. (In re Eric J. (1979) 25 Cal.3d 522, 530.) A defendant convicted of one crime is not similarly situated to a defendant convicted of a different crime (People v. Jacobs (1984) 157 Cal.App.3d 797, 800, 803), and a recidivist previously convicted of a serious or violent felony is not similarly situated to a recidivist previously convicted of a nonserious, nonviolent felony, in that the former has previously demonstrated a much greater danger to society than the latter. (People v. Cooper [(1996) 43 Cal.App.4th

> 815, 828].) Thus, the alleged disparities between the Three Strikes Law's effect on [Petitioner] and his hypothetical escalating recidivist do not implicate the equal protection clause. (Id. at pp. 828-830; People v. Kilborn [(1996) 41 Cal.App.4th 1325, 1330-1332].)

(Answer, Exh. C-101).

Equal protection analysis may be invoked when two groups of similarly situated individuals are treated differently. Romer v. Evans, 517 U.S. 620, 631, 116 S.Ct. 1620, 1627, 134 L.Ed.2d 855 (1996); Freeman v. Santa Ana, 68 F.3d 1180, 1187 (9th Cir. 1995). However, unless the classification which separates the two groups is one which has been found to be suspect, the justification for such classification need only be reasonably related to a legitimate state interest to satisfy the Fourteenth Amendment. Romer, 517 U.S. at 631.

Petitioner is not entitled to relief on this claim because the distinction between those sentenced under Three Strikes and those sentenced under other sentencing guidelines is not one that the Court has found to be suspect. See, Romer, 517 U.S. at 629 (noting that the Court has applied heightened scrutiny when examining classifications based on sex, illegitimacy, race and ancestry). In rejecting equal protection challenges to "Three Strikes," California courts have found a legitimate state interest behind its classification of prisoners.

> The [California] Legislature stated its intent in modifying section 667 was "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." (§ 667, subd. (b).) It is clear the Legislature intended to set . . . recidivists with prior "strike" convictions apart from first time offenders and those with less serious criminal histories; it is equally clear that it did so with a legitimate objective in mind.

People v. Spears, 40 Cal.App.4th 1683, 1687 (1995). Distinguishing between recidivist and non-recidivist criminals in the severity of sentencing is rationally related to meeting this

legitimate state interest. Thus, the rational basis test is met, and there is no equal protection violation. Romer, 517 U.S. at 631. The California courts' denial of this claim was not contrary to, and did involve an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States and was not based on an unreasonable determination of the facts in light of the evidence before it. 28 U.S.C. § 2254(d).

F. Cruel and Unusual Punishment

Petitioner's final claim is that his sentence of twenty-five years to life under "Three Strikes" constitutes cruel and unusual punishment. (Petition, 7(c)). The California Court of Appeal denied this claim finding that Petitioner's sentence was based on his status as a recidivist and that under the Supreme Court's Eighth Amendment jurisprudence, Petitioner's sentence was not "grossly disproportionate" to the crime. (Answer, Exh. E-102-03). In denying this claim, the court found that Petitioner "had prior convictions for grand theft auto (two), grand theft property, preventing or dissuading a witness by threat or force, trespass with injury to property, second degree burglary, and using or being under the influence of a controlled substance. He had spent many years in prison and was on parole for the 1989 robbery conviction at the time he committed the current offense." (Id., at 103).

Although twenty-five years to life is a lengthy sentence, "outside the context of capital punishment, successful challenges to the proportionality of particular sentences will be exceedingly rare." Solem v. Helm, 463 U.S. 277, 289-90, 103 S.Ct. 3001, 3009, 771 L.Ed.2d 637 (1983) (citation omitted). The Ninth Circuit has interpreted Supreme Court holdings to find that "only extreme sentences that are grossly disproportionate to the crime" violate the Constitution. United States v. Bland, 961 F.2d 123, 129 (9th Cir.), (quoting Harmelin v. Michigan, 501 U.S. 957, 1001, 111 S.Ct. 2680, 2705, 115 L.Ed.2d 836 (1991) (Kennedy, J., joined by O'Connor and Souter, JJ., concurring)), cert. denied, 506 U.S. 858, 113 S.Ct. 170, 121 L.Ed.2d 117 (1992). Weighing against a finding of disproportionality is California's legitimate state interest "'in

dealing in a harsher manner with those who [are] repeat[] criminal[s].'" Bland, 961 F.2d at 129 (quoting Rummel v. Estelle, 445 U.S. 263, 276, 100 S.Ct. 1133, 1140, 63 L.Ed.2d 382 (1980)).

As the California Court of Appeal found, petitioner has a lengthy criminal record and is the type of repeat offender that California's "Three Strikes" law is meant to punish more harshly than others. His sentence does not give rise to an inference of disproportionality. See e.g. Harmelin, 501 U.S. at 961, 996, 111 S.Ct. at 2684, 2702 (upholding life sentence without parole for first offense of possession of 672 grams of cocaine); United States v. Carr, 56 F.3d 38, 39 (9th Cir.) (sentence of 262 months for conviction of sale of 66.92 grams of cocaine with enhancement for two prior convictions does not raise inference of gross disproportionality), cert. denied, 516 U.S. 895, 116 S.Ct. 248, 133 L.Ed.2d 173 (1995).

The California courts' denial of this claim was not contrary to, and did no involve an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States and was not based on an unreasonable determination of the facts in light of the evidence before it. 28 U.S.C. § 2254(d).

IV. RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the court issue an Order: (1) approving and adopting this Report and Recommendation and (2) directing that the Petition be denied and dismissed with prejudice.

DATED: July 11, 2001

/S/
JEFFREY W. JOHNSON
United States Magistrate Judge

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file Objections as provided in the Local Rules Governing the Duties of the Magistrate Judges and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.